

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**DENIS JAMES CHASE, and
LINDA MICHELLE CHASE, d/b/a
Mozart's Bistro, d/b/a Brownies, d/b/a
Whistle Stop,**

Debtors.

Case No. **05-64439-13**

MEMORANDUM OF DECISION

At Butte in said District this 1st day of March, 2006.

Pending in this Chapter 13 bankruptcy case are: (1) confirmation of the Debtors' Chapter 13 Plan, and (2) the Chapter 13 Trustee's objection to Debtors' claim of homestead exemption, filed on November 22, 2005, on the grounds the claimed homestead consists of two (2) parcels of commercial property purchased at different times and should be denied with respect to the commercial property other than Debtors' residence. After due notice hearing on these matters was held at Great Falls on January 26, 2006. The Debtors Denis James Chase ("Denis") and Linda Michelle Chase ("Linda") both appeared and testified, represented by attorney Gary S. Deschenes ("Deschenes"). The Chapter 13 Standing Trustee Robert G. Drummond appeared in opposition to confirmation and Debtors' homestead exemption. Exhibit ("Ex.") 1 consisting of Debtors' recorded homestead exemption in Lots 1, 2, 3, 4, and 5, Block 8, Glacier Park Original to the Town of East Glacier, Glacier County, Montana, according to the official plat or map on file, was admitted into evidence by stipulation of counsel. At the conclusion of the parties'

cases-in-chief the Court granted the parties time to file briefs, after which the matter would be taken under advisement. The parties' briefs have been filed and reviewed by the Court, together with the record and applicable law. This matter is ready for decision.

This Court has jurisdiction over this Chapter 13 bankruptcy under 28 U.S.C. § 1334(a). Confirmation of Debtors' Chapter 13 Plan and the Trustee's objection to exemption both are core proceedings under 28 U.S.C. § 157(b)(2)(B). At issue is: first, whether the Trustee has satisfied his burden of proof under F.R.B.P. 4003(c) to show that Debtors' homestead exemption in the nonresidential commercial property is not properly claimed; and second, whether Debtors satisfied their burden of satisfying the requirements for confirmation of their Plan under 11 U.S.C. § 1325(a). For the reasons set forth below, separate Orders will be entered overruling the Trustee's objection to exemption based upon Montana's liberal policy in favor of homestead exemptions, and overruling the Trustee's "best interests of creditors" objection and confirming Debtors' Chapter 13 Plan. This Memorandum of Decision includes this Court's findings of fact and conclusions of law.

FACTS AND PROCEDURAL HISTORY

Debtors Denis and Linda own 2 commercial properties in East Glacier, Montana, located on the 5 above-described lots where they operate 2 tourist-oriented businesses and have their main residence. Denis testified that they reside from April through October in a 1 bedroom apartment in the back of a 2-story log cabin located on Lots 1 and 2 at 1020 Highway 49 in East Glacier, which they purchased in 1988 for \$49,000 and where they have resided during the tourist season every year since. The rest of the year they reside in a house at Great Falls¹ which they

¹They operated a restaurant in Great Falls named Mozart's, but it failed and closed.

purchased 2 years ago.

On the ground floor of the log cabin at Lots 1 and 2 is “Brownies”, a small grocery store which Linda testified is 100 years old and in constant need of repair. Denis testified that they purchased adjacent Lots 3, 4, and 5 in 1993 for \$54,000. On Lot 5 is a small building where Denis and Linda operate the “Whistle Stop Café” in a building Denis described as smaller than a 2-car garage. Linda testified that the Whistle Stop is old and in need of repair. Lots 3 and 4 consist of parking, which both Debtors testified is necessary for the successful operation of both Brownies and the Whistle Stop Café.

Denis testified that they were not very successful when they first bought Brownies and realized that the grocery store did not generate enough income for the short tourist season. They purchased the Whistle Stop Café and its parking lots in order to ensure they had parking for customers of Brownies. Denis testified that Brownies still does not generate enough income by itself to maintain their household, and that they need the income from the Whistle Stop Café and the parking on Lots 3 and 4 for both of their businesses to succeed. Linda testified that their accountant advised them that Brownies was not a viable business by itself, and that buying the Whistle Stop Café helped but added more debt service. Denis testified that they tried to keep both businesses open all winter one year but the result was a large loss because the highway on which they are located closed for the winter.

Because of the small size of the Whistle Stop Café, the ice machine and storage essential for the Whistle Stop Café’s operations are located in Brownies. Linda testified that the Whistle Stop Café is old and in need of repair and lacks a walk-in cooler, so they rely on Brownies for storage for the Whistle Stop Café’s supplies. Both Denis and Linda testified that because of the

shared space and parking their East Glacier properties have all become one.

Debtors filed their voluntary Chapter 13 petition, Schedules and Statement of Financial Affairs on October 12, 2005, listing assets valued at \$208,341.05 and liabilities in the sum of \$289,743.58. Denis testified that they recorded their homestead exemption on their East Glacier property on the day before they filed their petition. Schedule A lists real property including a parcel at 3401 7th Avenue North in Great Falls, Montana, valued at \$155,000.00 securing a claim in the amount of \$156,979.00, and a property located at 1021 Hwy 49 described as “Lots 1, 2, 3, 4, and 5 Block 8 Glacier Park Original Glacier Park” valued at \$32,813.00 and unencumbered by any mortgage. Denis testified that their attorney had the East Glacier properties appraised by a realtor, Debbie Hollenberg, to arrive at the scheduled value, and that he believes the properties have declined in value since Debtors purchased them. In essence, Denis testified, the Debtors are “buying a job” at their East Glacier businesses.

On Schedule C Debtors claim 1021 Hwy 49 as an exemption under Montana’s homestead statutes, Mont. Code Ann. §§ 70-32-104 and 25-13-615, in the amount of \$100,000.00 with the current market value of \$32,813.00. Denis testified that they claim Lots 1, 2, 3, 4, and 5 as their homestead. Schedule I lists Debtors’ monthly income in the total amount of \$24,372.00, consisting of \$23,521.00 from their businesses and \$851.00 social security. Schedule J lists total monthly expenses of \$24,145.00, including a monthly mortgage of \$1,555.00 to First Franklin.

The Statement of Financial Affairs lists past yearly business income as \$164,648.00 in 2005 to the petition date, \$288,576.00 in 2004, and \$541,741.00 in 2003; and social security income of \$8,510.00 to day in 2005, \$11,016.00 in 2004, and \$10,784 in 2003. Debtors filed their Chapter 13 Plan on October 19, 2005, proposing monthly payments in the amount of

\$227.00 for 36 months and no distribution to unsecured claims, and no payment of arrearages on impaired secured claims.

Objections to confirmation were filed by National City Bank of Kentucky c/o NCHLS National City Home Loans (“National City Bank”) and the Chapter 13 Trustee on the grounds Debtors’ Plan fails to provide for delinquencies on National City Bank’s allowed secured claim. National City Bank filed Proofs of Claim Nos. 5 and 6 on November 14, 2005, asserting claims in the amount of \$124,630.54 and \$31,352.70, but neither proof of claim asserts any delinquency or arrearage. The Trustee filed his objection to Debtors’ homestead exemption in commercial property not occupied as a residence, and objects to confirmation on the grounds the Plan may fail to meet the “best interest of creditors” test under 11 U.S.C. § 1325(a)(4) because of the value of the alleged nonexempt commercial property, i.e., the Whistle Stop Café and parking on Lots 3, 4, and 5. Debtors responded that both properties are necessary for their homestead and that the Code does not distinguish property purchased at different times. On January 19, 2006, the Trustee filed supplemental objections to confirmation on the grounds Debtors failed to turn over to the Trustee monthly operating reports of their business, but the Trustee stated at the hearing that that objection is cured.

CONTENTIONS OF THE PARTIES

The Trustee objects to Debtors’ homestead exemption on the grounds it comprises two difference parcels purchased at different times, and that the Whistle Stop Café property is not necessary for the maintenance of their home which is located in Brownies. The Trustee concedes the Debtors’ homestead exemption in Lots 1 and 2 at Brownies should be allowed, but contends that under this Court’s decision *In re Moore*, 21 Mont. B.R. 255 (Bankr. D. Mont. 2006), that the

exemption in the Whistle Stop Café on Lots 3, 4, and 5 should be disallowed because it is not necessary for the Debtors' continued enjoyment of their home. The Trustee argues that Debtors maintained their home before they purchased Lots 3, 4, and 5, that they have social security income and business income to make their plan payment without the Whistle Stop Café property, and that the Court should determine that the Debtors' business use of the properties serves a purpose wholly apart from the maintenance of their residence and homestead and is not necessary for the maintenance of their homestead.

The Debtors contend that Brownies and the Whistle Stop Café are necessarily interlinked because the Whistle Stop Café requires Brownies' storage and refrigeration facilities, and Brownies needs the parking on Lots 3 and 4. Debtors' argue that they cannot meet their financial needs and maintain their homestead at Brownies without the Whistle Stop Café income and parking. Debtors note that *Moore*, any Montana Supreme Court cases and Montana homestead statutes do not distinguish between parcels purchased at separate times.

DISCUSSION

I. Homestead Exemption.

Rule 4003(c), F.R.B.P., provides in pertinent part that "the objecting party has the burden of proving that the exemptions are not properly claimed." The Chapter 13 Trustee, as objecting party, has the burden of proof on the issue of Debtors' homestead claimed on Lots 3, 4, and 5 where the Whistle Stop Café is located. Debtors listed their homestead exemption on their Schedule C along with their other property claimed as exempt, pursuant to 11 U.S.C. § 522(b)(2) and F.R.B.P. 4003(a). The provision of § 522(b)(2)(A) in effect in this case apply state or local exemption law "that is applicable on the date of the filing of the petition at the place in which the

debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition." Pursuant to § 522(b)(2), Montana has opted out of the federal exemption scheme by means of Mont. Code Ann. § 31-2-106². *Moore*, 21 Mont. B.R. at 257; *In re Zimmerman*, 2002 MT 90, ¶8, 19 Mont. B.R. 368, 370 (2002); *In re Reilly*, 18 Mont. B.R. 193, 194-95 (Bankr. D. Mont. 2000); *In re Schmitz*, 16 Mont. B.R. 512, 515 (Bankr. D. Montana 1998); *In re Mackenzie*, 16 Mont. B.R. 338, 340 (Bankr. D. Mont. 1998). The Court thus looks to state law rather than federal law to determine the allowance of the Debtors' claimed homestead exemption. *Moore*, 21 Mont. B.R. at 257; *Reilly*, 18 Mont. B.R. at 194-95; *In re Loeb*, 12 Mont. B.R. 524, 527 (Bankr. D. Mont. 1993).

Under Montana law, homestead and exemption statutes must be liberally construed in favor of debtors. Constitution of the State of Montana, Article XIII, section 5; *In re Zimmerman*, 2002 MT 90, at ¶15, 19 Mont. B.R. at 37; *Moore*, 21 Mont. B.R. at 257-58; *MacDonald v. Mercill* (1986), 220 Mont. 146, 714 P.2d 132, 135; *De Fontenay v. Childs* (1933), 93 Mont. 480, 485, 19 P.2d 650, 651. This Court summarized the liberal policy underlying construction of Montana's homestead exemption in *In re Burnett*, 17 Mont. B.R. 509, 516 (Bankr. D. Mont. 1999):

Montana's Constitution and case law require that the homestead be liberally construed in favor of the claimant. Constitution of the State of Montana, Article XIII, section 5; *In re Mackenzie*, 16 Mont. B.R. 338, 343 (Bankr. Mont. 1998); *Neel v. First Fed. Sav. and Loan Assoc. of Great Falls*, 207 Mont. 376, 383, 675 P.2d 96, 100 (1984); *Oregon Mortgage Co. v. Dunbar*, 87 Mont. 603,

²Section 31-2-106 provides in pertinent part: "**Exempt Property – bankruptcy proceeding:** An individual may not exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. § 522(d). An individual may exempt from the property of the estate in any bankruptcy proceeding: (1) that property exempt from execution of judgment as provided in . . . Title 25, chapter 13, part 6,"

289 P. 559 (Mont. 1930); *Glass v. Hitt (In re Glass)*, 60 F.3d 656, 570 (9th Cir. 1995).

With such guidance, and placing the burden of proof on the objecting party, the Court turns to the Trustee's objection. The Trustee objects to Debtors' homestead exemption in Lots 3, 4, and 5 because that is a different parcel than their homestead at Brownies, was purchased at a different time, and that the Whistle Stop Café property is not necessary for the maintenance of their home and serves a purpose wholly apart from the maintenance of their residence and homestead. The Trustee offered no evidence in support of his argument that the Whistle Stop Café income and parking are not necessary for Debtors' homestead which controverted both Debtors' sworn testimony that their income from Brownies was not enough to support their homestead and that they needed the Whistle Stop Café's income and parking to maintain their homestead. The Court observed both Debtors' demeanor while each testified under oath about their need for the Whistle Stop Café property's income and parking to maintain Brownies and their homestead, and the Court finds that they both were credible witnesses. *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *see also, Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998). Based on the Debtors' uncontroverted testimony, the Court finds that Debtors need the Whistle Stop Café property's income and parking from Lots 3, 4, and 5 in order to maintain their homestead and the business they operate Brownies.

Section 101 of Chapter 32, Title 70, Mont. Code Ann., provides that a "homestead consists of the dwelling house or mobile home, and all appurtenances, in which the claimant resides and the land, if any, on which the same is situated, selected as provided in this chapter." By way of limitation, § 104 provides that a "homestead may not exceed \$100,000 in value."

Mont. Code Ann. § 70-32-104; *Moore*, 21 Mont. B.R. at 257-58.

Neel articulated the general intent of the homestead exemption scheme, stating that "[t]he purpose of the framers of the law was to secure a home beyond the reach of financial misfortune, around which gather the affections of the family; the greatest incentive to virtue, honor and industry." *Neel*, 207 Mont. at 387, 675 P.2d at 102; *Earls v. Chase Bank of Texas, N.A.*, 2002 MT 249, ¶ 23, 312 Mont. 147, 154, ¶ 23 59 P.3d 364, 368, ¶ 23. This language clearly contemplates a financial utility to the homestead which is reflected in the history of the homestead legislation and supports Debtors' claim of homestead exemption in Lots 3, 4 and 5 because the Whistle Stop Café provides the means "to secure a home beyond the reach of financial misfortune" for the Debtors on Lots 1 and 2 by providing income and parking necessary for the success of Brownies, where they reside.

In *Moore* this Court construed *Oregon Mortgage Co., Ltd. v. Dunbar* (1930), 87 Mont. 603, 289 P. 559-60, and concluded that Montana's current homestead laws do not appear to prohibit debtors from claiming a homestead exemption in multiple parcels of property provided the claimed exemption does not exceed the statutory limitations and provided the allowance of the exemption furthers the purpose of the homestead laws. *Moore*, 21 Mont. B.R. at 258-59. The Court agreed that "a debtor may be entitled to claim a homestead exemption on multiple parcels of property if the debtor adequately demonstrates that the parcels appurtenant to the dwelling are in fact utilized by the debtor indiscriminately for the purpose of maintaining the homestead". *Moore*, 21 Mont. B.R. at 259-60. The purpose of the homestead exemption is to preserve the home and those adjacent appurtenances essential to its continued enjoyment. *In re Schriock*, 192 B.R. 514, 515 (Bankr. N.D. 1995). "This concept should not be understood in

terms of acreage or boundaries but rather in terms of how the adjacent land is used and how it contributes to, or preserves the enjoyment of the home.” *Id.*

In *Moore*, the Court sustained the Trustee’s objection to a homestead exemption in a separate 20 acre parcel because there was no showing of an apparent relationship or interdependency between it and the 30 acre homestead parcel, or that the 20 acre parcel was necessary for the debtor’s continued enjoyment of his home. *Moore*, 21 Mont. B.R. at 260. In the instant case, by contrast, the evidence is uncontroverted that Debtors cannot maintain their homestead on Lots 1 and 2 where Brownies is located without the income and parking from the Whistle Stop Café on Lots 3, 4, and 5.

In construing statutory homestead language this Court wrote in *Burnett*:

This Court’s role in construing Montana statutes is to “ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted. . . .” Mont. Code Ann. § 1-2-101; *See Siuru v. Sell*, 108 Mont. at 444, 91 P.2d at 413-14. The intention of the legislature is to be pursued. Mont. Code Ann. § 1-1-102. Courts do so by interpreting the plain meaning of the words used by the legislature in the statute. *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995). Where the language is clear and unambiguous, the statute speaks for itself and the Court will not resort to other means of interpretation. *Id.*; *State v. Zabawa*, 279 Mont. 307, 313, 928 P.2d 151, 155 (1996).

17 Mont. B.R. at 516.

At the time of *Dunbar* and *De Fontenay*, the homestead statutory provisions included an express acreage limitation and required that the land selected be used for agricultural purposes. *See De Fontenay*, 93 Mont. at 485, 19 P.2d at 651. But those requirements were deleted by subsequent amendments, and now do not defeat Debtors’ homestead exemption claimed in commercial property. Debtors claim a \$100,000 homestead exemption, which is the limit allowed under Mont. Code Ann. § 70-32-104. The Trustee offered no evidence at trial that the

value of Debtors' homestead exceeds the allowable amount. With respect to the different parcels making up Debtors' claimed homestead on Lots 1, 2, 3, 4, and 5, given Debtors' residence on the contiguous land as a family and economic unit, and their homestead exemption not appearing to exceed the statutory limitations and allowance of the exemption, the Court finds that Debtors are not prohibited under Montana law from claiming their homestead exemption in Lots 3, 4, and 5 in addition to Lots 1 and 2, to the latter of which the Trustee concedes.

Based upon the plain language of § 70-32-101 and §70-32-104, and under the liberal construction of those under the Montana Constitution, this Court finds and concludes that the Trustee failed to satisfy his burden of proof under F.R.B.P. 4003(b) of showing by a preponderance of the evidence that the Debtors' homestead on Lots 1, 2, 3, 4, and 5 is not properly claimed.

II. Confirmation.

It is well established law in this Circuit that for a bankruptcy court to confirm a plan, each of the requirements of section 1325 must be present and the debtor has the burden of proving that each element has been met. *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1994); *In re Andrews*, 49 F.3d 1404, 1408 (9th Cir. 1995); *Chinichian v. Campolongo*, 784 F.2d 1440, 1443-44 (9th Cir.1986) (citing *In re Elkind*, 11 B.R. 473, 476 (Bankr.D.Colo.1981)); *Accord 550 West Ina Rd. Trust v. Tucker*, 989 F.2d 328, 330 (9th Cir.1993); *Downey Sav. and Loan Ass'n v. Metz*, 820 F.2d 1495, 1496 (9th Cir.1987).

The Trustee's objections to confirmation of Debtors' Plan includes the "best interest of creditors" test of 11 U.S.C. § 1325(a)(4), which requires that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured

claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.” The Trustee’s “best interest of creditors” objection presumes that his objection to Debtors’ homestead would be sustained, but since as discussed above the homestead exemption in Lots 1, 2, 3, 4, and 5 is to be allowed the Trustee’s “best interest of creditors” objection under § 1325(a)(4) is moot.

Other objections to confirmation were filed by the Trustee and National City Bank on the grounds that the Plan fails to cure the delinquencies on National City Bank’s allowed claims. However, National City Bank’s Proofs of Claim Nos. 5 and 6 both state that no arrearages are owed, so National City Bank’s objection is defeated by the prima facie evidentiary effect given its allowed Proofs of Claim under F.R.B.P. 3001(f). Further, National City Bank failed to appear at the confirmation hearing to prosecute its objection, and the Trustee did not pursue that objection at the hearing.

The Debtors’ Plan provides for payment of disposable income each month in the sum of \$227.00, which was calculated from Debtors’ Schedules I and J, the latter of which includes a monthly home mortgage payment in the sum of \$1,555.00. That payment can only be made to National City Bank as the holder of the allowed claims secured by a mortgage on Debtors’ Great Falls residence, because there is no allowed claim secured by Debtors’ homestead at Brownies, nor any other claim secured by real estate listed on Schedule D. Based upon National City Bank’s Proofs of Claim both stating no arrearage or delinquencies owed and National City Bank’s failure to appear at the hearing and prosecute its objection, the Court finds that the Trustee’s and National City Bank’s objections are without merit and that Debtors have satisfied their burden of proof under § 1325.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this Chapter 13 bankruptcy under 28 U.S.C. § 1334(a).
2. Confirmation of Debtors' Plan and the Chapter 13 Trustee's objection to exemption are core proceedings under 28 U.S.C. § 157(b)(2).
3. The Trustee failed to satisfy his burden of proof under F.R.B.P. 4003(c) to show that the Debtors' homestead exemption is not properly claimed under Mont. Code Ann. §§ 70-32-101 and 104.
4. Debtors satisfied their burden of proof under 11 U.S.C. § 1325 to satisfy all requirements for confirmation of their Chapter 13 Plan.

IT IS ORDERED separate Orders shall be entered in conformity with the above, overruling the Chapter 13 Trustee's objection to Debtors' claim of exemption, filed November 22, 2005; and overruling the objections to confirmation filed by the Trustee and National City Bank, and confirming Debtors' Chapter 13 Plan filed October 19, 2005.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana